Track 1 - Session 2

ADR: The Right Remedy for Unhealthy Conflicts?
About the Presenter...

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Dispute Resolution

Geoffrey A. Drucker

_American Health Lawyers Association_

13.1 Introduction

Disputes within the health care system are unique in several key respects:

a) _Frequency:_ Health care is increasingly delivered by teams of professionals with diverse backgrounds, perspectives, and training who bear enormous responsibility and operate under tremendous pressure with limited resources.\(^1\) Friction between team members is inevitable.

At the organizational level, physician practice groups are merging into hospitals, hospitals are merging into hospital chains, and a variety of health care organizations are banding together into Accountable Care Organizations.\(^2\) Tensions are likely to flare as individuals and groups are severed from their traditional moorings and thrust into new relationships with unfamiliar policies and procedures and a highly uncertain future.

b) _Consequences:_ In health care settings, lives are on the line. When personal friction stifles or impedes communication between health care workers, patients may suffer death or serious injury.\(^3\) Other types of health care disputes involve money, not well-being, but because health care spending represents nearly 18% of the Gross Domestic Product,\(^4\) the sums involved can be vast. And profitability determines the quantity and quality of health care that organizations can deliver.

c) _Confidentiality:_ Health care disputes, regardless of the subject matter, typically concern sensitive information that patients, providers, and payers wish to keep private.

d) _Ongoing Relationships:_ Because collaboration is a cornerstone of modern health care, health care professionals often cannot distance themselves from people with whom they are in conflict. They must find a way to put their differences aside and reengage productively.

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\(^1\) Pamela Mitchell et al., _Discussion Paper: Core Principles & Values of Effective Team-Based Health Care, Institute of Medicine_ (October, 2012) available at https://www.nationalahec.org/pdfs/VSRT-Team-Based-Care-Principles-Values.pdf.


\(^3\) Gerald B. Hickson et al., _Balancing Systems and Individual Accountability in a Safety Culture_, Chapter 1 in _From Front Office to Front Line: Essential Issues for Health Care Leaders_ (2nd Ed.).

This chapter explains how attorneys can tailor arbitration, mediation, and conflict management to help health care organizations address these unique challenges.

13.2 Arbitration

In its classic form, arbitration is a contract between two or more parties to adjudicate a dispute privately. A single arbitrator, or a panel of three, hears evidence and renders an award (binding decision) in accordance with a set of rules.

13.2.1 Potential Advantages

Arbitration offers the following potential advantages over litigation:

- **Speed**: In many state and federal courts, cases take years to get to trial because court rules permit attorneys to engage in protracted discovery and bury the other side in motions, and because judicial resources to manage dockets are dwindling. Trials drag on endlessly as creative litigators invoke arcane rules of evidence to conjure up objections to testimony and documentary evidence.

  In arbitration, parties may agree to eliminate or set strict limits on discovery and motions; select an arbitrator or panel who can move a case along expeditiously; minimize the grounds for evidentiary objections; and require that an award be issued within a set period of time.

- **Finality**: A trial court verdict can be appealed for errors of fact or law. In many court systems two levels of appeal are available. If a verdict is overturned by an appellate court, it may be returned to the trial court for further proceedings.

  Arbitration awards cannot be overturned for errors of fact or law. A court may vacate an arbitration award only upon proof of a serious flaw such as corruption, fraud, evident partiality, misbehavior that prejudices a party’s rights, or where the arbitrators exceed their powers or fail to issue a mutual, final and definite award.

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5 Some statutes dictate the procedures under which certain disputes must be arbitrated and/or require participation in arbitration. See 29 C.F.R. § 4221.5 (ERISSA); Cal. Bus. & Prof. Code § 6200 et seq. (attorney fee disputes).

6 Some state and federal courts mandate that parties participate in non-binding arbitration. See M. Moffitt and A.K. Schneider, *Dispute Resolution: Examples & Explanations* (Wolters Kluwer 2nd Ed. 2011) p. 240). In addition, although it is far less common than binding arbitration, parties may contract for a non-binding award—a recommended decision—to use as a reference point in settlement negotiations. See the Non-Binding Arbitration Rules of the American Arbitration Association available at http://www.adr.org/aaa/faces/services/disputesolutionsservices/arbitration/nobindingarbitration;jsessionid=dmsSGVJ42yDkflsLVGv7ZhxSGkxKrbvb813R2HqX25nFdBLYWhqW14332501111_afrLoop=1737463284622394&_afrWindowMode=0&_afrWindowId=null%40%3F_afrWindowId%3Dnull%26_afrLoop%3D1737463284622394%26_afrWindowMode%3D0%26_adf.ctrl-state%3Dsk2dGcvkn_4.


Since the Federal Arbitration Act (FAA) reflects a “liberal federal policy favoring arbitration,” courts tend to interpret Section 10 narrowly, overturning an award only when the arbitration process is severely flawed. Parties cannot confer jurisdiction on a court to vacate an award on any grounds other than those set forth in Section 10. Five federal circuits have held that they, too, lack authority to create additional grounds for vacating award. The other five circuits will vacate an award in the extreme event that an arbitrator purposefully disregarded a well-defined, explicit, and clearly defined law. Some of these circuit decisions rest on the theory that, under the FAA, an arbitrator does not have the authority to manifestly disregard the law. Other decisions characterize manifest disregard of the law as a violation of public policy.

c) **Cost:** In litigation, the costs of adjudication (e.g., judge, clerk’s office, court room) are publicly funded; whereas parties to arbitration must pay for the arbitrator’s time and expenses and the costs of administering the arbitration process. While these charges can mount up, they pale in comparison to potential savings in attorneys’ fees. As is indicated above, arbitration may greatly reduce the number of hours spent on discovery, pre-hearing motions, evidentiary objections, and appeals.

d) **Expertise:** Judges and juries often lack sufficient knowledge of health law and health care to render an informed decision. In arbitration, the parties may select an arbitrator who possesses whatever background and experience they deem necessary to weigh the relevant facts and law. They may select a recognized expert on Medicare reimbursement in one case, a board certified cardiologist in another, and a retired hospital executive in a third. By choosing a qualified decision-maker, parties not only increase their chances of receiving a fair reward, they also promote settlement by making the outcome more predictable.

e) **Privacy:** Court proceedings are open to the public and press. Arbitrations are generally private. Only party representatives, witnesses, and the arbitrator attend the hearing. Only the persons directly involved in pursuing or responding to a claim, or administering the claims process, gain access to documents used in arbitration.

14 See *Arbitration Vacator*, supra. See also *Westerbeke v. Daihatsu Motor*, 304 F.3d 200, 208 (2nd Cir. 2002).
15 See 9 U.S.C. § 10(a)(4) and *Arbitration Vacator*, supra.
16 See *Arbitration Vacator*, supra.
13.2.2  Realizing Time and Cost Savings

Is arbitration truly faster and less expensive than litigation? As is the case in many areas of law, the answer is “It depends.” If the parties agree to streamlined rules of procedure that limit discovery, motions, and objections, and that empower the arbitrator to narrow the issues to be addressed during the hearing, the savings may be substantial. However, if the parties transform arbitration into scorched earth litigation by consenting to full-blown discovery or unlimited motions, arbitration is likely to cost even more than court proceedings.\(^\text{19}\) Similarly, arbitration will be much faster than litigation if attorneys agree to an aggressive timeline, but not if they seek liberal extensions. To move cases off their docket, judges may deny unopposed extensions. Arbitrators, having been hired by the parties, have no incentive to deny extensions agreed to by all parties.

Another key factor is whether the parties opt for a single arbitrator or a panel of three.\(^\text{20}\) Since arbitration awards are subject to very limited review, parties often feel more secure vesting decision-making power in a panel rather than in a single individual, especially in high stakes cases. But three arbitrators cost significantly more than one, as all must be compensated for time and expenses. In addition, the average amount of time required to obtain an award is significantly higher when the parties select a panel. Likely reasons are the need to find available dates for conference calls and the hearing for all three arbitrators, and the additional time required for arbitrators to consult and reach agreement on a variety of issues.

In short, to save time and money, parties must provide for a streamlined process that, in its most efficient form, vests nearly unfettered authority in a single decision-maker. The more arbitration resembles litigation in form, the more it resembles it in price and delay.

13.2.3  Getting Cases Into Arbitration

Parties can agree to arbitrate a claim at any time, even after litigation has already commenced. But most cases find their way to arbitration through a pre-dispute agreement: a clause inserted into a contract that requires arbitration of any disputes arising out of the relationship created by the contract. Once a dispute arises, it is often too late for parties to agree on a process for resolving them. Communication has deteriorated to the point where an open, objective dialogue about the mutual benefits of arbitration is not going to occur.

Arbitration can be either administered or self-administered. Administered means the process is run by an organization with rules of procedure for arbitration and a roster of arbitrators, such as AHLA. Self-administered means the parties select an arbitrator on their own, and the arbitrator and the parties manage the logistics of scheduling teleconferences, exchanging documents, booking a hearing room, etc. In a self-administered arbitration, the parties can require the arbitrator to follow an established set of rules, or they can create their own rules.


Even if parties agree to arbitrate under established rules, such as AHLA’s, they have a great deal of leeway to tailor the process as they see fit. Most rules can be amended to meet the needs of a particular situation. AHLA has a free guide that describes the issues to consider in drafting an arbitration clause and provides sample language and drafting tips.\(^\text{21}\) The importance of devoting time and attention to drafting an appropriate arbitration clause cannot be overemphasized. A few minutes of thoughtful labor at the front end can save weeks, months, or years of aggravation after a dispute arises.\(^\text{22}\)

13.2.4 Employment and Consumer Disputes

Arbitration developed as a means for resolving disputes between two or more companies in the same industry. However, in recent decades, it has become common for businesses in many industries, including health care, to include arbitration clauses in contracts with employees and consumers. In the health care context, “consumer” means an individual who receives health care services, or a person who represents such an individual, such as the son or daughter of a resident in a long-term care facility.\(^\text{23}\)

Since business-to-individual contracts are typically drafted by the business and regarded as non-negotiable, individuals frequently argue either they did not consent to arbitrate, or that, even if they did, the arbitration clause is fundamentally unfair to them and, therefore, should not be enforced.

13.2.4.1 Agreements with Employees

If an arbitration clause appears in an employee handbook, a preliminary question is whether the employee assented to it. Many courts have found no agreement to arbitrate where the employee merely received or acknowledged receipt of the handbook.\(^\text{24}\)

Even if agreed to by an employee, an agreement to arbitrate is contrary to public policy if it curtails his or her substantive rights. For example, an arbitration clause may not impede an employee’s ability to enforce statutory rights, raise the burden of proof, or limit damages or attorney’s fees.\(^\text{25}\)

Arbitration need not offer all the procedural protections available in court, such as full blown discovery or strict rules of evidence.\(^\text{26}\) But terms cannot be “so one-sided that their only possible purpose is as to undermine the neutrality of the proceeding.”\(^\text{27}\) The dividing line between less-than-litigation-but-okay and unacceptable is murky at best. Some courts require that an employee pay no arbitration costs, whereas others require an employee to prove costs are so excessive that they deter the filing of claims.\(^\text{28}\)

\(^{21}\) http://www.healthlawyers.org/dr/Pages/Arbitration.aspx.


\(^{24}\) Arbitrating Employment Disputes: Avoiding 10 Mistakes in Preparing and Implementing a Pre-Dispute Arbitration Program, SK013 ALI-ABA 829 § II (A) (Paul, Hastings, Janofsky and Walker LLP 2004).

\(^{25}\) Green Tree Financial Corp. v Randolph, 531 U.S. 79, 90 (2000); Arbitrating Employment Disputes, note 24 above.


\(^{27}\) Hooters of America, Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999).

\(^{28}\) See Cole v. Burns International Security Services, 105 F.3d 1465, 1481 (C.A.D.C. 1997) (arbitrator’s compensation and expenses must be paid by employer alone); Rosenberg v. Merrill Lynch, 170 F.3d 1, 16 (1st Cir. 1999) (employee can present argument about excessive fees post award to a reviewing court).
If a claim does not involve statutory rights, courts will examine whether the process is so unbalanced as to be unconscionable. Standards vary from state to state but typically require proof that: (a) one party had no meaningful opportunity to draft the contract terms, and (b) the terms unreasonably favor the other party. The first prong is often met in employment cases because the arbitration clause is non-negotiable. Case law on the second prong varies widely. There is no judicial consensus on what procedures are unconscionable.

13.2.4.2 Agreements with Consumers

An employer may present an employee with an adhesive (non-negotiable) arbitration clause, so long as it is reasonably fair. In contrast, a consumer’s agreement to arbitrate must be knowing and voluntary. Knowing means arbitration is explained in a manner the consumer can understand. Voluntary means the health care provider cannot withhold services from a consumer who declines to sign the pre-dispute clause. To ensure an agreement is voluntary, a court may require that the consumer have been accorded the right to revoke his or her consent to arbitration for up to 30 days after signing.

An added complication in many consumer cases is that the consumer is incapacitated at the time of admission, so the agreement to arbitrate is signed by a family member. If the consumer has not conveyed a broad power of attorney to the signatory, a court may determine that he or she was not authorized to consent to arbitration.

Some state statutes prohibit nursing homes from requiring consumers to arbitrate negligence or wrongful death cases. However, the Federal Arbitration Act preempts these laws. Courts must determine case by case whether an agreement to arbitrate runs afoul of a statute or precedent applicable to all contracts.

To ensure fairness, arbitration administrators such as AHLA and the American Arbitration Association have adopted special rules for employment and consumer cases.

30 See Arbitrating Employment Disputes, note 24 above.
31 See Johnson v. Circuit City Stores, 148 F.3d 373, 378-79 (4th Cir. 1998), aff’d, 203 F.2d 821 (4th Cir. 2000); Martindale v. Sandvik, Inc. 173 N. J. 76, 800 A.2d 872 (2002);
33 See Arbitrating Wrongful Death Claims for Nursing Home Patients, supra, pp. 559-564.
13.2.5 Summary

A clause requiring parties to arbitrate disputes arising out of a health care contract helps ensure claims are decided by a neutral with sufficient knowledge of health law and the delivery of health care to render a fair decision. Arbitration also keeps sensitive health-related information out of the public eye. If parties resist the urge to treat arbitration like litigation, they are likely to save a substantial amount of time and money as well.

13.3 Mediation

In the legal context, mediation refers to settlement negotiations that are assisted by a neutral third party. Neutral means the mediator has no interest in what the terms are and makes no attempt to steer the parties in a particular direction. However, mediators are advocates for settlement and will zealously strive to overcome barriers to agreement.

13.3.1 Advantages for Health Law Cases

The benefits of mediation are comparable to those available through arbitration. Mediations typically last no more than a day, and, except in extremely complex cases such as class actions, rarely extend more than a few days. Thus, mediation is far less expensive and time-consuming than litigation. The parties select the neutral, and may therefore choose someone with the type of health law or health care background they deem necessary to understand the case. Mediation is informal, so parties can determine where, when, and how they want the process to unfold. If the parties reach an accord, it will be as final and binding as any other settlement agreement. And, as is the case in arbitration, mediation sessions are private so parties can keep sensitive health information out of the public eye.

Mediation obviously compares very favorably to litigation, but parties always have the option to negotiate an agreement on their own, without the additional expense of a neutral. So the real question is what value a mediator adds to the negotiation process. First, a mediator can secure a deal early on, before both sides have incurred the costs and aggravation associated with discovery, pre-trial proceedings, and trial preparation.37

In complex cases, mediation can be highly productive long before the parties are ready to trade settlement proposals. The mediator can help parties structure an efficient and effective discovery process. For example, in lieu of an expensive battle of experts, parties may agree to secure an opinion from one agreed upon expert. A neutral who has worked with the parties on structuring discovery will be well prepared to assist in reaching a deal when the time is ripe to settle.

A second reason for bringing in a mediator is to preserve or restore relationships between health care workers or organizations. Settlement negotiations are typically lawyer-to-lawyer, with no direct contact between clients. Mediation provides a forum in which clients and client representatives can

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air differences, share information, express emotions, ask questions, apologize, seek or grant forgiveness, and find pathways to move forward.

13.3.2 Mediating Effectively

Used properly, mediation is highly effective. Settlement rates can reach as high as 80-85%.

A significant percentage of cases settle even when mediation is involuntary (court-ordered). To reap these benefits, attorneys need to know how to: (a) secure an agreement to mediate; (b) select the right mediator; and (c) prepare to mediate.

13.3.2.1 Agreeing to Mediate

Attorneys are often reluctant to propose mediation for fear of looking weak. They believe suggesting mediation is tantamount to admitting that their client is reluctant to try the case, and, consequently, is willing to make major concessions. Health care attorneys can overcome this barrier to mediation in three ways.

The first is to secure a pre-dispute agreement to mediate. Typically, such a clause requires mediation of any dispute arising out of the relationship created by a contract. Since it is usually hard to predict what type of dispute might arise, or when, it is best not to get too specific about how mediation will work. Here is a sample from the AHLA Guide to Arbitration Clauses:

Prior to filing a claim for arbitration under this clause, a party must request mediation through the AHLA Dispute Resolution Service. No earlier than 60 days after notifying the opposing party that the request for mediation was submitted to AHLA, a party may initiate arbitration through the AHLA Dispute Resolution Service if, for any reason, the matter has not been fully resolved in mediation.

No court will compel the other side to make a reasonable settlement offer or reach agreement, but getting to the table is more than half the battle. Once there, most parties will operate in good faith.

A second way to avoid proposing mediation of a particular case is to propose mediation in every case. A health care organization, or a firm that practices health law, may adopt a policy requiring that mediation be considered for every claim, either before litigation begins or shortly after it is filed. No one is compelled to mediate if, for example, one or both sides see a strong need to establish a

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38 The McCammon Group has mediated over 10,000 cases with a settlement rate of approximately 85%. See http://www.mccammongroup.com/mediation-services/. The Financial Industry Regulatory Authority (FINRA) has a settlement rate of 80%. See http://www.finra.org/ArbitrationAndMediation/Mediation/Overview/. A court connected mediation program achieved an overall settlement rate of 69%, and over 80% of cases settled if, prior to the session, the court had ruled on any pending motions. Naman L.J. Wood, Can Judges Increase Mediation Settlement Rates? Of “Coase” They Can, 26 OHIO ST. J. ON DISP. RESOLUTION 683 (2011).


41 The full guide is available at http://www.healthlawyers.org/dr/Pages/Arbitration.aspx.

42 A court will compel a party to mediate if it has clearly agreed to do so. E.g., In re Pisces Foods, 228 S.W.3d 349 (Ct. App. Tx 2007).

legal precedent. With such a policy in place, instead of having to say “Would you consider mediating this case?” and fear sounding weak or desperate, an attorney can say, “Our corporate policy is to considering mediating every claim before surrendering control to a judge, jury, or arbitrator. What is your position regarding mediation?”

A third strategy to avoid directly proposing mediation is to ask a mediation provider such as the AHLA Dispute Resolution Service to broach the subject with the other side. The provider need not mention that it is acting at the behest of the other party.

### 13.3.2.2 Selecting a Mediator

The key question to ask in selecting a mediator is who both sides will trust and respect. A brief example helps illustrate why these qualities are so critical. Imagine if, at the 11th hour, after a long, hard day of negotiation, the mediator advises Party A that Party B has reached its limit. In the mediator’s opinion, if Party A wants a deal it is going to have to bridge the remaining gap between their offers. The first question on Party A’s mind should be: Do I trust that the mediator is telling me what he believes is the truth, and is not trying to pull the wool over my eyes to get a deal? The second question should be: Do I respect the mediator’s opinion? Do I think his assessment of Party B’s position is accurate, or do I believe Party B has pulled the wool over the mediator’s eyes? If Party A trusts and respects the mediator, Party A will reluctantly accept Party B’s final offer. If either trust or respect is lacking, Party A may call what it suspects is the mediator’s or Party B’s bluff, and the deal may fall through.

Since health law is so complex and specialized, parties tend to trust and respect recognized subject matter experts. In disputes involving ongoing relationships, the parties also may require a mediator they can relate to on a personal level, which often means someone with a similar background. Organizations that administer mediations such as AHLA can recommend candidates with the expertise or experience the parties are looking for.

### 13.3.2.3 Preparing for Mediation

Preparing for mediation is much different than trial preparation, but no less important. Since most voluntary attempts to reach agreement succeed, mediation is likely to be the most consequential event in the life of a case. In addition to having a thorough knowledge of the relevant facts and law, health care attorneys should create an effective presentation, ensure their client representative is adequately briefed, and have a realistic settlement proposal in hand.

Mediation often begins with a joint session, which means all participants are in the room together. Attorneys often fail to leverage this golden opportunity to tell a compelling story. Audio-visual materials can be very effective tools for driving key points home.

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46 Alexia Morrison, Weapons for Peace, TRIAL (December 2007), P. 36.
If an attorney is representing a health care organization, a key decision is who to select as the client representative. The representative must have adequate settlement authority, and should also have the personality and skills to help sway the other side. The representative needs to have a firm understanding of his or her role before the session commences.47

Attorneys are often extremely reluctant to put a realistic offer on the table. However, social science research has persuasively shown that the party who goes first is able to anchor the conversation on its terms and thereby gain a distinct advantage.48 So attorneys are well advised to arrive with a proposal they can defend as reasonable. What attorneys should not have when mediation begins is a firm bottom line. Instead, they should be willing to let this line shift as they acquire new information.

13.3.3 Combining Mediation and Arbitration

Attorneys need not make an either/or choice between mediation and an arbitration. A pre-dispute agreement may provide for mediation first, with arbitration to follow if the parties cannot reach an agreement. Alternatively, parties may attempt to reach a settlement through mediation during the course of arbitration proceedings.

Parties also may empower a single neutral to serve as both a mediator and arbitrator. In Med-Arb, the neutral first attempts to mediate a settlement. If this effort fails, the neutral convenes a hearing and issues an award. As the name suggests, Arb-Med begins in arbitration, but before issuing an award, the neutral attempts to broker a deal. In both processes, the neutral’s ability to issue an award provides extra leverage in pushing for an agreement. In a conventional mediation, parties may discount the mediator’s assessment of the strengths and weaknesses of their case if they feel it is off the mark. When the mediator is the ultimate decision-maker, his or her assessment cannot be ignored.

When agreeing to Arb-Med or Med-Arb, parties need to address whether the neutral may rely on information provided in mediation when issuing an arbitration award. AHLA has developed guidance on how to address this potentially thorny issue.49

13.3.4 Summary

Mediation is as private as arbitration and can be even faster and less expensive. Mediation’s greatest potential value is in health care cases where the parties need to have an ongoing relationship. Unlike litigation and arbitration, which tend to make bad relationships even worse, mediation can bridge differences and restore or improve communication. Furthermore, in mediation parties retain control over their destiny. They can withdraw from the process at any time, without consequences, unless they agree to settle.

47 See Weapons for Peace, note 40 above.
If parties arrive at mediation well-prepared, with appropriate settlement authority, they are very likely to reach an agreement. Typically, the biggest challenge is getting to the table. Attorneys can ease the way by agreeing to mediate in advance (in a pre-dispute clause) or by drafting a policy for their health care organization or law firm requiring that mediation be considered in every case.

13.4 Conflict Management

Conflicts pose problems in all organizations, but in health care institutions the causes and consequences are especially acute. Dysfunctional relationships, often emanating from the stress and fatigue of long hours spent caring for the sick and dying, have been linked to medical errors and preventable adverse outcomes (as well as dissatisfied patients and high staff turnover). In other words, workplace conflict can have a direct and immediate impact on patient care. For this reason, The Joint Commission requires hospitals seeking accreditation to implement systems for “resolving conflicts among individuals working in the hospital” and “managing conflicts among leadership groups.”

Attorneys need not confine their role to helping health care organizations cope with the fallout of mismanaged conflict, such as medical malpractice suits and peer review hearings to withdraw a disruptive physician’s credentials. They can also suggest ways of reducing future exposure to liability. Health care lawyers have been at the forefront of efforts to develop new and better ways of managing health care disputes. For example, Carole Houk and Richard Boothman have designed successful programs to resolve disputes arising from adverse medical events through open disclosure and dialogue.

13.5 Conclusion

The suggestions provided in this chapter can be distilled into this sound bite: “Don’t wait until it’s too late.” Friction within the American health care system can easily heat up into a dispute and boil over into the litigation. Lawyers can add value by helping health care organizations manage conflict better right from the start, and by channeling disputes that require third party intervention into mediation and arbitration. Once parties march down the litigation path, reining them back in is far more difficult. Although parties may have a mutual interest in putting their differences to rest quickly, inexpensively, fairly, and privately, it is hard to get highly polarized disputants to agree on anything.

Help clients manage disputes effectively before patients are bled dry by tragic medical errors, and individuals and organizations in the health care system are bled dry by the litigation that ensues.

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52 See the bibliography in the Conflict Management Toolkit, supra.
ADR: The Right Remedy for Unhealthy Conflicts?

*Health, Labor, & Employment Institute 2015*
*State Bar of Wisconsin*

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**Overview**

Potential Advantages of Arbitration and Mediation for Health Care Employment Disputes

Best Practices for Arbitration and Mediation

Why ADR is catching on for False Claims Act cases

The AHLA Dispute Resolution Service
Potential Advantages of Arbitration (Part 1)

- **Confidentiality**
  - Existence of dispute
  - Allegations and demands
  - Pleadings, testimony, and evidence
  - Outcome

- **Speed/finality**
  - Reduced discovery and motions practice
  - No court backlog for hearings
  - Deadline for issuing award
  - Very limited grounds for vacating an award

Potential Advantages of Arbitration (Part 2)

**Fairness/Predictability**
- Decision-maker with subject matter expertise
- Settlement easier to negotiate when outcome is more certain

**Cost:** Savings in legal fees may far exceed costs of neutral and neutral administrator

Barriers to Success

- **Confidentiality**
  - Litigation to compel arbitration and/or to enforce award

- **Speed/Cost**
  - Using a panel instead of a single arbitrator
  - Turning arbitration into litigation
    - Filing every conceivable motion
    - Engaging in full-blown discovery
    - Requiring adherence to judicial rules of evidence

- **Fairness/Finality**
  - Using negotiation leverage to pressure other party into signing a one-sided agreement to arbitrate
Best Practices

- Restrict use of panels to very large cases (if any)
- Set clear expectations for advocates
  - Get to the heart of the dispute quickly
  - Do not advance every conceivable argument
  - Do not try every conceivable tactical ploy
  - Do not bury the other side in unnecessary discovery requests
  - Do not resist requests for relevant information
- Set clear expectations for clients
  - You may have to pay money to get sued
  - You may have to pay for an award that goes against you
  - You may not get the arbitrator you want and you cannot control the process even though you are paying for it

Mediation

- Potential to be even faster and less expensive than arbitration
- Just as confidential
- Final 75-85% of the time (if voluntary)
- No loss of control
- Can preserve or improve relationships

Best Practices

Make mediation a prerequisite to arbitration (or litigation)
  - 30 or 60 day window before either party can file
  - client must see value in mediating even if they perceive the other side’s case as weak
Alternatively, require advocates to propose mediation in every case
  - overcomes resistance to “appearing weak”
Train lawyers and clients in mediation advocacy
  - trial lawyers like to turn it into a trial
  - clients need to know what to expect
False Claims Act

- Relator often an employee
- Common personnel actions involving relators
  - Wrongful termination
  - Retaliation
  - Harassment
- May be mutual interest in confidential resolution
  - Avoid bad press
  - Get back to business/find a new job
- Increased judicial pressure to mediate

AHLA Roster of Neutrals

- National roster of
  - arbitrators
  - mediators
  - peer review hearing officers
  with health law and health care expertise
- Becoming a neutral:
  - No cost to join or remain on the roster
  - AHLA retains 18% of the amount billed and collected on behalf of neutrals (we don’t make money unless you make money)
  - Training in how to arbitrate and mediate health care disputes
  - Online application, instructions, and minimum requirements on Neutrals page of AHLA website
  - Administrative support and use of electronic case management system

Using the Dispute Resolution Service

- Arbitration
  - Claim form on AHLA website
  - Low filing fees ($250-$450 for two party case)
  - No other fees except arbitrator’s time and expenses
- Mediation
  - No fees except mediator’s time and expenses
  - Three selection methods
  - No rules, just agreement to mediate
Basic pre-dispute clause:

Any dispute arising out of or relating to this contract or the subject matter thereof, or any breach of this contract, including any dispute regarding the scope of this clause, will be resolved through arbitration administered by the American Health Lawyers Association Dispute Resolution Service and conducted pursuant to the AHLA Rules of Procedure for Arbitration. Judgment on the award may be entered and enforced in any court having jurisdiction.

Guide to Arbitration Clauses